Editor's note: Reconsideration granted; hearing ordered by order dated Aug. 27, 1982; decision reaffirmed -- See 79 IBLA 380 (March 27, 1984)

ERNEST HIGBEE ET AL.

IBLA 81-485 Decided December 17, 1981

Appeal from decision of Nevada State Office, Bureau of Land Management, declaring the Gravel Pit No. 5 placer mining claim null and void, and rejecting application for mineral patent. N 20320, Nevada Contest 3312, N 5753 C.A.

Affirmed.

1. Mining Claims: Lands Subject to

Lands which in 1929 were included in an oil and gas permit issued under the Mineral Leasing Act of 1920, were not subject to mining location, and mining claims located on such lands are invalid ab initio.

2. Mining Claims: Possessory Rights

In order to establish a right against the United States under sec. 2332, Revised Statutes, 30 U.S.C. § 38 (1976), actual possession, following discovery of a valuable mineral deposit, under color of right for the complete period of the State's statute of limitations governing adverse possession of mining claims must occur during a period when the land is open to operation of the mining laws. Where the record does not support an assertion of a right under 30 U.S.C. § 38 (1976) to a mineral patent, the application for such patent is properly rejected and the mining claim declared invalid.

APPEARANCES: Harry D. Pugsley, Esq., Salt Lake City, Utah, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Ernest Higbee and others 1/ have appealed the Nevada State Office, Bureau of Land Management (BLM), decision of March 2, 1981, which declared the Gravel Pit No. 5 placer mining claim null and void ab initio and rejected mineral patent application N 20320 for W 1/2 SE 1/4 NW 1/4, E 1/2 NE 1/4 SE 1/4 NW 1/4 sec. 21, T. 21 S., R. 60 E., Mount Diablo meridian, Clark County, Nevada. The decision stated that the Gravel Pit No. 5 placer mining claim was located February 13, 1929, and recorded in Clark County records February 19, 1929, in Book 9 of Minerals at page 229, and that the W 1/2 sec. 21, T. 21 S., R. 60 E., was embraced in oil and gas permit CC 015633, issued June 15, 1928, and subsequently cancelled December 24, 1941. BLM ruled, therefore, that as lands embraced in oil and gas lease offers or leases and permits issued under the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976), are not subject to mining location, the Gravel Pit No. 5 claim is null and void ab initio because the land was not open to mineral location when the location was made. As the mineral location was null and void ab initio, no rights could be based on the location, and as the record does not contain any indication that the claim was relocated at a time when the land was open to mineral location, BLM held mineral patent application N 20320 for rejection, unless claimants could submit evidence to establish rights to lands included in application N 20320 under 30 U.S.C. § 38 (1976). BLM also rejected a supplemental application for mineral patent embracing E 1/2 NE 1/4 SE 1/4 NW 1/4 sec. 21, T. 21 S., R. 60 E., in Gravel Pit No. 5A placer mining claim.

The decision further stated that the subject lands were segregated from mineral location June 15, 1928, until December 24, 1941, by oil and gas permit CC 015633; from August 6, 1943, when oil and gas lease application CC 021588 was filed until February 10, 1948, when the lease issued July 1, 1944, was cancelled; and from October 2, 1953, by Small Tract Classification Order No. 95, which is still in effect.

The decision recited the types of affidavits and evidence required to support a claim under 30 U.S.C. § 38 (1976), and allowed 30 days for submission of such supporting evidence demonstrating entitlement of the applicants to consideration.

The mineral applicants filed a notice of appeal, a motion to strike the BLM decision, and a motion to require production of documents.

The case has had a long and convoluted career, which we will set out in some detail to enable a better understanding of the problems involved in this appeal.

Contest complaint Nevada 3312, United States v. Ernest Higbee, William Higbee, Lawrence Higbee, Lila Crane, and Zelda Allen, was issued by the then Nevada Land Office, Bureau of Land Management,

1/ The appellants are Ernest Higbee; Lawrence Higbee; Earl L. Higbee, Administrator; Lila Crane; Zelda Allen; and H & P Land Company, Inc.

October 1, 1962, against the Gravel Pit Nos. 5 and 9 placer mining claims, charging:

1. The land embraced within the claims is nonmineral in character.

2. Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

3. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.

It is apparent that, at the time of issuance of the contest complaint, there had been no check of the land status records to ascertain if the lands involved were open to mineral location on the date of the location of the Gravel Pit Nos. 5 and 9 claims.

The contestees denied the charges and the matter came to hearing August 9, 1963, but the contestees made no appearance. Based on the uncontested testimony presented by the Government, the hearing examiner held the claims invalid. On appeal, that decision was upheld by the Director, Bureau of Land Management, but by Secretarial decision, A-30348 of August 26, 1965, the matter was remanded for a further hearing. Following the second hearing, the hearing examiner, by decision of January 13, 1967, declared the Gravel Pit Nos. 5 and 9 placer mining claims invalid because no discovery of minerals on either claim had been shown. This decision was upheld on appeal by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, in a decision dated September 25, 1968, and by the Department in United States v. Higbee, A-31063 (Apr. 1, 1970). The matter was then litigated in the United States District Court for the District of Nevada, and judgment entered for the defendant. Higbee v. Morton, No. 1674 (D. Nev. May 5, 1972). However, on appeal the Ninth Circuit's decision, Higbee v. Morton, No. 72-2406 (July 22, 1974), vacated the district court finding and remanded the case for administrative reconsideration of the issue of marketability of the material on Gravel Pit Nos. 5 and 9 claims as of the time of location in 1929.

This Board, in an order dated May 5, 1976, remanded the case to the Hearings Division for a hearing before an Administrative Law Judge with instructions to write a recommended decision specifically addressing the marketability of the deposit in 1929, on July 23, 1955, and as of the date of hearing.

In a decision of January 18, 1978, the Administrative Law Judge recommended that Gravel Pit No. 9 claim be held null and void because

no discovery of a valuable mineral deposit had been made within its confines, but that the Gravel Pit No. 5 claim be considered valid under the United States mining laws. The decision recited that the original locations had included 160 acres for each claim, and that they were 2 of 10 claims located by I. W. Higbee and seven other locators. At the time of hearing, Gravel Pit No. 5 consisted of 40 acres in SE 1/4 NW 1/4 sec. 21, T. 21 S., R. 60 E., and Gravel Pit No. 9 consisted of 120 acres in N 1/2 NW 1/4 NW 1/4, NE 1/4 NW 1/4, and N 1/2 NE 1/4 sec. 24, T. 21 S., R. 60 E.

By decision of August 7, 1978, the Nevada State Office, Bureau of Land Management, held mineral patent application N 20320 for rejection because it described two noncontiguous parcels, contrary to the Departmental interpretation of the mining laws, and advised the applicants how to file a separate application for the second tract. Applicants did file such an application for E 1/2 NE 1/4 SE 1/4 NW 1/4 sec. 21, T. 21 S., R. 60 E., for the Gravel Pit No. 5A claim, and retained the W 1/2 SE 1/4 NW 1/4 sec. 21, T. 21 S., R. 60 E., in the original application.

On November 2, 1978, counsel for the Government moved to remand the case to BLM to allow issuance of a decision declaring the Gravel Pit No. 5 claim null and void ab initio because the land embraced in the claim was not open to mineral location on the date of location, February 13, 1929. Counsel for the contestees moved to strike the Government's motion.

This Board by decision, United States v. Higbee, 52 IBLA 83 (1981), granted the motion to remand, stating:

> The Department of the Interior has plenary authority over the administration of the public lands, including mineral lands, and the Secretary of the Interior has broad authority to issue regulations concerning them. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). The Secretary of the Interior is charged with seeing that valid mining claims are recognized, invalid ones eliminated, and the rights of the public preserved. Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); Duguid v. Best, 291 F.2d 235 (9th Cir. 1961), cert. denied, 372 U.S. 906 (1963).
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> * * * The grant of an oil and gas permit under the Mineral Leasing Act precludes, as long as the permit is in force, the appropriation of land therein included under the mining laws. H. Leslie Parker, 54 I.D. 165, 173 (1933); Filtrol Co. v. Brittan and Echart, 51 L.D. 649, 653 (1926); Joseph E. McClory, 50 L.D. 623, 626 (1924). See also letter

from Secretary Work to Hon. Charles L. Richards, House of Representatives, dated October 9, 1924, at 50 L.D. 650. 1/

Similarly, land which, in 1946, was included in an oil and gas lease issued under the Mineral Leasing Act was not subject to mining location and, in the absence of a showing of compliance with the Acts of August 12, 1953, 30 U.S.C. § 501 (1976), or of August 13, 1954, 30 U.S.C. § 521 (1976), mining claims located on such land are invalid. Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957).

Failure of the mining claimants to comply with the redemption provisions of the Acts of August 12, 1953, or of August 13, 1954, is not excused by BLM's failure to notify them of the availability of those provisions. Dorothy Smith, 39 IBLA 306 (1979). See also Dorothy Smith, 44 IBLA 25 (1979), and Charles House, 42 IBLA 364 (1979).

The authority of the United States to enforce a public right or to protect a public interest, including the rights to cancel an invalid mining claim which encumbers public land, is not vitiated or lost by acquiescence of officers or agents of the Government or by their laches or delays in performance of their duties. Dorothy Smith, 39 IBLA 306 (1979).

* * * If the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been complied with, the Department cannot legally grant the gratuity which claimants request, that is, issuance of a mineral patent. United States v. New Jersey Zinc Co., 74 I.D. 191 (1967).

In this case, as the record is not clear that the claimants have complied with the law regarding their location, it is appropriate to remand the record to BLM for a determination of the rights of the claimants to the Gravel Pit No. 5 placer mining claim.

Accordingly, the motion of the Government to have the case remanded is granted, and the motion of the contestees to strike is denied.

1/ In 1954 Congress passed the Multiple Mineral Development Act, 30 U.S.C. §§ 521-531 (1976), which authorized the

location of mining claims on public lands which had previously been segregated from mineral entry by the Mineral Leasing Act.

The BLM decision of March 2, 1981, followed, from which this appeal arose.

[1] It is axiomatic that mining claims located on land not subject to mining location are invalid ab initio. E.g., Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966). Furthermore, such claims are not validated by a later modification or revocation of an order of withdrawal which opens the land thereafter to mineral entry. David W. Harper, 74 I.D. 141 (1967). For claims located prior to 1954, the Department of the Interior has ruled consistently that valid mining claims cannot be located on land covered by oil and gas leases or permits, or by applications or offers for such leases or permits. 2/ E.g., A. V. Toolson, 66 I.D. 48 (1959); Dredge Corp., 64 I.D. 368 (1957); Clear Gravel Enterprises, Inc., supra; H. Leslie Parker, supra; Filtrol Corp. v. Brittan and Echart, supra. See also Arthur L. Rankin, 73 I.D. 305 (1966); Alumina Development Corporation of Utah, 67 I.D. 68 (1960); United States v. United States Borax Co., 58 I.D. 427 (1943); Joseph E. McClory, 50 L.D. 623 (1924); Messilla Valley Construction Co., A-28102 (Nov. 20, 1959); United States v. Borders, A-27493 (May 16, 1958); Alex Boyle, A-27518 (Jan. 17, 1958); David H. Turnbaugh, A-27245 (Sept. 23, 1957); Edith F. Allen, A-27455 (July 16, 1957); Clear Gravel Enterprises, Inc., A-27787 (Mar. 27, 1956); R. L. Greene, A-27181 (May 11, 1955). We are not aware of any reversal of the Department's interpretation by any court. As oil and gas permit CC 015633, issued June 15, 1928, embraced the land on which the Gravel Pit No. 5 claim was located on the date of its location, February 13, 1929, BLM properly declared the Gravel Pit No. 5 claim null and void ab initio because the land was not then open to mining location.

There is nothing in the record to indicate that the mining claimants attempted to relocate the Gravel Pit No. 5 claim during any of the periods when the land was open to operation of the mining laws. Nor do appellants suggest that any such action was taken.

Appellants argue that the existence of oil and gas permit CC 015633 presents a bona fide issue of fact, and that they are entitled to a hearing, especially as their request for copies of the oil

2/ In 1954 lands included in a permit or lease, or an application therefor, issued under the mineral leasing laws were made available for mining claim location under the mining laws. See 30 U.S.C. § 525 (1976). Congress also permitted legalization of mining claims located between July 31, 1939, and January 1, 1953, on lands included in an issued lease or permit or application for a lease or permit under the mineral leasing laws. See 30 U.S.C. §§ 501-505 (1976). It does not appear that appellants could have benefited from these provisions as their claim was located in 1929.

and gas permit case record has been denied with the assertion "case file was destroyed in 1975." It is well established, however, that no hearing is required to declare mining claims void ab initio where the records of the Department show that at the time of location of the claims the land was not open to such location. John C. Thomas (On Reconsideration), 59 IBLA 364 (1981); Dorothy Smith, 44 IBLA 25 (1979); see United States v. Consolidated Mines and Smelting Co., Ltd., 455 F.2d 432 (9th Cir. 1971). At the time Gravel Pit No. 5 claim was located in 1929, the land office maintained tract books in which all applications, entries, permits, leases, rights-of-way, and patents identified by serial register number, were entered to the appropriate section, township, and range, with the aliquot subdivisions of the section enumerated. On January 17, 1964, the record system in the Nevada State Office for land status was revised with a historical index established for each township, on which every action granted, i.e., entry, permit, lease, right-of-way, or patent is entered in consecutive chronological order, as well as master title plats graphically depicting the areas included in such patents, entries, leases, etc., and pending applications, each identified by the serial register or patent number. Use plats for leasable minerals are also provided where applicable, with the leased areas superimposed on a master title plat, and likewise identified by serial number. If the locators of Gravel Pit No. 5 had checked the land office plat and tract book for T. 21 S., R. 60 E., in February 1929, they would have been made aware of the existence of oil and gas permit CC 015633.

The attempt of appellants to read something sinister into the BLM statement that the case record of CC 015633 has been destroyed overlooks the statutory mandate requiring periodic destruction of Government records which lack preservation value. 44 U.S.C. §§ 3301-3324 (1976). Records of terminated mineral leases and permits issued under the authority of the mineral leasing acts are transmitted regularly from BLM state offices to a Federal records center, and there they are destroyed in accordance with the schedule submitted by BLM to General Services Administration. The records from the Nevada State Office are transmitted to the Federal Records Center, 1000 Commodore Drive, San Bruno, California 94066. Following destruction of the case records, evidence of the existence of the mineral lease or permit may be obtained from the historical index and the appropriate serial register page. The serial register is an abstract or digest of the case represented by the numbered page. Thus, the serial register gives an excellent summary of every case.

The serial register page for CC 015633 discloses that the application for an oil permit under the Act of February 25, 1920, was filed March 18, 1927, by Sara E. Schofield for S 1/2 sec. 17; SW 1/4 sec. 16; W 1/2, SE 1/4 sec. 21; SW 1/4 sec. 22; all sec. 27; all sec. 34; SW 1/4 sec. 35, T. 21 S., R. 60 E.; and all of secs. 6 and 7, T. 22 S., R. 61 E. The permit was issued June 15, 1928, for SW 1/4 sec. 16, S 1/2 sec. 17, NW 1/4 sec. 21, SW 1/4 sec. 22, T. 21 S., R. 60 E., and lands in T. 22 S., R. 61 E., for a total of 2,400 acres. In December

1939, the permittee filed an application to exchange the permit for a lease, which was issued January 1, 1940. The lessee filed a relinquishment of the lease November 29, 1941, which was accepted and the lease cancelled December 24, 1941, with posting of the cancellation occurring February 23, 1942. At that time, the land embraced in the Gravel Pit No. 5 claim thus came open to mining location.

The historical index indicates that sec. 21, T. 21 S., R. 60 E., was later included in oil and gas lease CC 021568. The serial register shows that Myron Andrews filed application CC 021568 for this oil and gas lease on August 6, 1943, thereby removing the land from operation of the mining laws. A lease was issued July 1, 1944, and remained in effect until cancelled February 10, 1948, with the status records being noted March 19, 1948. At that time, the land again was open to mining location.

Thereafter, on October 2, 1953, all sec. 21, T. 21 S., R. 60 E., was classified for disposal under the Small Tract Act, by Small Tract Classification Order No. 95. This action segregated the land from all appropriation, including under the mining laws, except as provided in the notice of classification. This classification is still in effect for the N 1/2 sec. 21.

Appellants contend that the "purported" oil and gas permit in 1928 was never recorded in Clark County, Nevada, where the land is situated, so the permit is not a valid basis for declaring the Gravel Pit No. 5 claim void ab initio. There is no Federal requirement that oil and gas permits or leases be recorded in the local county records. The status records for public lands of the United States within the State of Nevada were maintained in 1929 in the United States District Land Office in Carson City, Nevada. Prudence would have dictated that a person seeking to enter unpatented public land by means of a mining claim should ascertain the availability of the desired land from the official land status records in the land office. There is no indication that the locators of Gravel Pit No. 5 claim sought any information as to the status or availability of the land included in the claim before the attempted location in February 1929.

Appellants also argue that the present BLM decision being appealed is arbitrary and capricious in light of the prior proceedings before this Board, the Secretary of the Interior, the United States District Court, and the Court of Appeals for the Ninth Circuit, adjudicating the validity of the Gravel Pit No. 5 claim. We recognize that the present question of invalidity ab initio was not presented in any of the prior proceedings. Had that question been raised, however, we feel certain that the claim would have been declared invalid ab initio because the land was not open to mining location when the location was attempted. The Department of the Interior has plenary authority over the administration of the public lands of the United States, including the mineral lands. Best v. Humboldt Placer Mining Co., supra. The Secretary of

the Interior is charged with seeing that valid mining claims are recognized, invalid ones eliminated, and the rights of the public preserved. Palmer v. Dredge Corp., supra; Duguid v. Best, supra. As 43 CFR 1810.3 points out, the authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act or delays in the performance of their duties.

Appellants may also not be heard to charge estoppel against BLM because it issued a mineral patent to another claimant in 1961 for a portion of sec. 21, T. 21 S., R. 60 E., included in a mining claim located contemporaneous with Gravel Pit No. 5 and for land likewise included in oil and gas permit CC 015633. If a mistake was committed by BLM in issuance of that patent, such action cannot be considered a precedent for making a similar mistake in this case. 3/

[2] Appellants contend that any defects in the original location of the Gravel Pit No. 5 claim are overcome by the provisions of 30 U.S.C. § 38 (1976), which provides that where a person or association has held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto. The pertinent Nevada statute, Nev. Rev. Stat. § 11.060 (1979), establishes 2 years for the occupation and adverse possession of a mining claim, and such occupation must consist of holding and working the claim in the usual and customary mode of holding and working similar claims in the vicinity thereof.

It is the position of this Board that the period of adverse possession must occur at a time when the land is open to mining location. Dolores Olsen, 45 IBLA 232 (1980); United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974). In the case of the Gravel Pit No. 5 claim, the only period exceeding 2 years when the land was open to operation of the mining laws occurred between February 10, 1948, when oil and gas lease CC 021588 was removed from the records by cancellation, and October 22, 1953, when Small Tract Classification Order No. 95 was promulgated. The record of this case does not reflect that the Gravel Pit No. 5 claim was held and worked by the claimants during that period. At the hearing before Judge John R. Rampton on September 1, 1976, the following colloquy took place during the cross-examination of Lawrence Higbee by Otto Aho, counsel for BLM.

> Q [Mr. Aho] Now, you said your father ceased operations in 1930 and moved to Alamo because of ill health?
>
> A [Lawrence Higbee] Right.

3/ There is no information in the record before us to indicate whether the patentee of that claim applied under the provisions of 30 U.S.C. § 38 (1976).

Q Did anybody take up any work on the claims after he left, did any of you boys do it?

A No, any of the family, no, I wasn't able to.

Q And it was after that time apparently when other people came in and located claims over this area, is that correct?

A That's right.

Q Now, when did you become interested in the claims again?

A It has been about ten or twelve years ago.

Q That would be '64, '65?

A Right.

Q And what renewed your interest in the claims at that time?

A We received a letter from the Bureau of Land Management where in turn they wanted a release of these claims.

Q Was that the first time you realized then that perhaps you still had some claims in the area?

A Yes.

* * * * * * *

Q And did you say you have done assessment work ever since '64, '65 on those two claims?

A Yes, sir.

Q Did you file affidavits on the assessment work?

A You bet we have.

MR. AHO: I have no further questions.

Tr. at 119, 120).

The only positive statement by the claimants is that they have occupied, claimed, worked, and developed the property for over the 15 years just prior to 1981 and have recorded the proofs of labor during that period. However, the land occupied by Gravel Pit No. 5 was

not open to the mining laws at any time during that period, so the claimants may not take advantage of the provisions of 30 U.S.C. § 38 (1976).

As the claimants have not demonstrated they ever made a valid location of the Gravel Pit No. 5 claim, the BLM decision must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed, and the Gravel Pit No. 5 placer mining claim is declared null and void, and the application for a mineral patent is rejected.

Douglas E. Henriques
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge